Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-791

In The

Supreme Court of the United States

October Term, 1990

EASTER HOUSE, an Illinois Not-for-Profit Corporation,

Petitioner,

v.

THOMAS FELDER, FLORENCE MCGUIRE, and JOAN SATOLOE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) An adoption agency's license expired. After a few weeks delay to insure the agency was in compliance with state rules, the State renewed the license. Was the agency deprived of its property without due process of law when Illinois law established procedures to challenge license revocations which the agency did not need and chose not to utilize?

2) An adoption agency sustained purported random and unauthorized deprivations of its property by a private citizen allegedly in conspiracy with state officials. Do adequate postdeprivation remedies under Illinois law provide all the process that is due under the Fourteenth Amendment?

3) Do the respondents, state officials charged with supervising the licensing of adoption agencies, have a qualified immunity from damages for their discretionary licensing decisions undertaken in 1975?

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STATEMENT OF THE CASE

A. The Departure of Smith from Easter House

Adoption agencies in Illinois are regulated and licensed by the Illinois Department of Children and Family Services (DCFS). DCFS officials are responsible for seeing that adoption agencies are in compliance with state standards and are properly carrying out their function, which is to place children put up for adoption with suitable adoptive parents.

Easter House was one such adoption agency. For the ten years preceding the events of this case, Millicent Smith was the Executive Director of Easter House, and was essentially running the agency on her own. The President and Chairman of Easter House was Seymour Kurtz, an attorney. Thomas Felder, Florence McGuire, and Joan Satoloe, the respondents, were all DCFS officials and professional social workers responsible for the licensing of child welfare agencies in the Chicago area.

Toward the end of 1974, the relationship between Smith and Kurtz began to deteriorate. Smith decided to leave Easter House and start her own adoption agency. On December 30, 1974, Smith met with McGuire at her DCFS office and told McGuire of her intention to leave and her reasons for doing so.

Smith told McGuire Kurtz was permitting unauthorized individuals access to agency files, and "hustling" clients with incomes over $50,000 to adopt children. (Pl. Ex. 110, Tr. 329) Smith also said Kurtz had set up "foundations" in The Hague, Netherlands and in Mexico to facilitate placement of Mexican babies, and that

Kurtz said he expected to "make a million" through this system[1]. (Pl. Ex. 110, Tr. 331) Smith felt her authority at the agency was being undermined. Her departure was not amicable.

Smith told McGuire her new agency would be called Easter House Adoption Agency, Inc., and that she was removing case files from Easter House to preserve their confidentiality and complete work on them which only she could do. (Tr. 386, Pl. Ex. 110) McGuire admonished Smith to submit a resignation letter to Kurtz immediately. (Tr. 354) Smith did so. (Pl. Ex. 116) McGuire also strongly urged Smith not to use the name Easter House, to avoid the obvious confusion two adoption agencies with the same name would cause. (Tr. 353) McGuire also admonished Smith that the files were not hers and belonged to Easter House. (Tr. 354) Smith was adamant that the name Easter House belonged to her because of her years of work with the agency. (Tr. 353, 1123)

Smith's departure from Easter House came at a time when the two-year state license of Easter House was expiring. Indeed, the license expired technically on December 1, 1984. (Def. Ex. 32) An initial license study by Satoloe (agencies are reviewed by DCFS when their licenses are up for renewal) indicated she would recommend renewal of Easter House's license. However, the

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[1] Smith's complaints about the foreign foundations were corroborated at the trial. The Netherlands foundation, Stichting Susu, was merely a letter drop. Mail directed to it was answered at Easter House's office in Chicago and sent back to the Netherlands for posting, giving the impression the letters were answered in Europe. (Def. Ex. 54, Tr. 854-55)

sudden departure of Smith (and another social worker she was taking with her), and the serious allegations she was making about Easter House's operations, changed the circumstances. Without any professional staff, Easter House was out of compliance with DCFS Regulation 5.10, which requires the agency to have an Executive Director with an M.S.W. degree and specified job experience. After the meeting with Smith, McGuire called DCFS headquarters in Springfield to request that the new license for Easter House, which had not yet been mailed, be held pending further investigation of Smith's charges. (Tr. 332, Pl. Ex. 110)

B. The Decision To Renew The License Of Easter House

DCFS staff were now faced with two decisions: whether to re-license Easter House, and whether to license Smith's new agency. We address first the relicensing of Easter House.

On January 6 and January 8, 1975, Felder sent Kurtz two certified letters. The January 6 letter states in pertinent part:

> [W]e have been notified that the executive director and the social worker have terminated their association with Easter House. Therefore, as of January 1, 1975, Easter House is no longer in compliance with licensing standards for child welfare agencies, and we have withdrawn our recommendation for renewal of the license which expired on December 1, 1974.
>
> If Easter House intends to operate again it will be necessary to make reapplication for license

> and to meet licensing standards for a child welfare agency.
>
> In the meantime, this letter will serve as official notice that Eater House is no longer licensed to operate as a child welfare agency and that any such activity would be contrary to the Child Care Act of 1969. (Pl. Ex. 121)

The January 8 letter from Felder to Kurtz reads as follows:

> Please refer to my letter of January 6, 1975 regarding the license status of Easter House. Omitted from the above-cited communication was the fact that should you wish, you have ten days from the date of *this* letter to request a review of the Department's action. Otherwise, the decision becomes final. (Pl. Ex. 124) (Emphasis in original).

Felder consulted DCFS legal counsel in the preparation of these letters. (Pl. Ex. 107) Kurtz received both letters on January 21, 1975. (Pl. Ex. 139, 163) (The delay was occasioned by Smith, who, unbeknownst to DCFS, unsuccessfully tried to redirect the agency's mail to her new office). (Pl. Ex. 163) Easter House remained open during this interval; DCFS made no effort to close the agency. Felder notified Judge Comerford, who supervised adoptions in the Circuit Court of Cook County, that the license expired, and that "renewal of Easter House's license is under review, and you will be advised of the outcome." (Pl. Ex. 123) Others who made inquiry in early January were similarly told by DCFS that Easter House was under review at this time. (Tr. 1198)

Without a qualified Executive Director or social worker, Easter House could not complete an adoption in any event, even if it was fully licensed.[2]

Kurtz hired a new Executive Director to replace Smith on January 21, 1975, the same day he received the certified letters. (Tr. 526) Kurtz requested a hearing at that time. (Pl. Ex. 139) On February 4, 1975, Kurtz and Felder met. (Pl. Ex. 107) Kurtz told Felder that if DCFS found the new Executive Director acceptable, he would waive the formal hearing offered him in the January 8 letter. (Tr. 967) On February 5, 1975, a letter of introduction from the new Executive Director, Rose Cummings, was delivered to DCFS. (Pl. Ex. 107) She was interviewed and her credentials approved on February 11, 1975. (Tr. 520) DCFS staff recommended release of the license on February 17, 1975, and the license was received by Easter House on February 19, 1975. (Pl. Ex. 107, 160) Judge Comerford was notified of this resolution. No new application by Easter House was required. (Tr. 1080)

Felder also notified the Director of DCFS of this resolution. (He refers to Kurtz's agency as Easter House I).

> As you are aware, the license of Easter House I was released 2-18-75. The only definable basis for withholding the license was the absence of

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[2] DCFS Regulation 5.10 provides:

> Only the executive director, social work supervisor, or a member of the social work staff under the supervision of a social work supervisor, shall assume responsibility for accepting, placing, or supervising a child outside his own home.

> staff meeting qualifications set for (sic) in CFS Regulation 5.10. This was overcome by the appointment of Mrs. Rose Cummings and other staff who appear to meet minimum qualifications. Although Easter House I's license was released, we remain uneasy about the manner in which persons contacting a child welfare agency are channeled through the series of organizations headed by Mr. Kurtz (Stichting Susu, Tyzril Foundation, Easter House I, Casa Del Sur). . . . (Def. Ex. 37)

Illinois law could not regulate the foreign foundations created by Kurtz, though DCFS staff had ongoing concerns over the way he was using them.

C. The Decision To License Smith's New Agency

At the same time the license status of Kurtz's agency was being resolved, Smith was seeking a license for her agency. Her actions during the months of January and February, 1975, created a number of complications in the processing of her license application. First was the corporate name. Although DCFS was troubled by her choice of the name Easter House, Felder and the other licensing staff concluded – supported by DCFS legal counsel – that DCFS had no jurisdiction over corporate names. Indeed, the Illinois Secretary of State, who must approve corporate names for Illinois corporations, permitted Smith to use the name Easter House.

Smith's removal of files raised another question. Smith told DCFS, Kurtz, and Judge Comerford that she returned to Kurtz all the files she removed. (Pl. Ex. 170) Felder took the position that this issue of private property

should be resolved by Kurtz and Smith on their own. (Tr. 996)

In addition, Smith tried to place a child with an Easter House client before her agency was licensed. She was discovered and her involvement stopped; she was denied a fee for the placement. Felder referred this matter to the State's Attorney's office. (Pl. Ex. 172) He admonished Smith she should not have attempted this placement until she was actually licensed. (Def. Ex. 26, 36) (Tr. 1357)

Despite these various problems associated with Smith's application, her license was approved by DCFS in early March, 1975. (Def. Ex. 20) The usual charter study and license study of the new organization were completed.[3] (Def. Ex. 9, 12) The DCFS staff recommended that Smith be licensed "despite the many complications" and concluded that "this organization is in reasonable compliance with minimum licensing standards." (Def. Ex. 37) They also concluded that in their prior association with Smith, they found her to be "professionally competent and responsible." (Def. Ex. 37)

When Smith was licensed on March 5, 1975, she was specifically told by the Director of DCFS:

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[3] Plaintiff tried to suggest at trial that these studies were not done, or were done inadequately. It was not disputed, however, that all of Smith's conduct was reported by respondents through the appropriate channels of DCFS. Smith's application was not approved any faster than the normal 60-90 days it usually takes. (Tr. 1206)

> Easter House may wish to take action against your use of this [corporate] name with the Secretary of State and through other court action under the Illinois Common Law. (Def. Ex. 20)

Easter House took no action in state court to enjoin Smith's use of the name, to recover files, or to collect damages for her unsuccessful attempt to place a child with one of its clients.

D. History Of The Case Below

The case was submitted to a jury under 42 U.S.C. 1983 as an alleged conspiracy between Smith and the DCFS defendants. Easter House alleged it was denied procedural due process in the way its license was initially withheld and Smith's granted; and that it was deprived of its property interests in its corporate name, files, and business, without due process. A second count alleging harassment of Easter House in a 1977 licensing investigation by DCFS was also submitted to the jury. The jury returned a verdict in favor of Easter House on both counts, including punitive damages against all the defendants. Smith did not appeal. The Seventh Circuit, sitting *en banc*, reversed both counts. *Easter House v. Felder*, 879 F.2d 1458 (1989). On March 5, 1990, this Court vacated and remanded for further consideration of the procedural due process claims in light of *Zinermon v. Burch*, 110 S.Ct. 975 (1990). The *en banc* Seventh Circuit again reversed the district court with directions to dismiss the complaint. *Easter House v. Felder*, 910 F.2d 1387 (1990). Easter House has again sought review in this Court.

REASONS FOR DENYING THE WRIT

I. EASTER HOUSE WAS NOT DEPRIVED OF IT8 PROPERTY WITHOUT DUE PROCESS OF LAW. IT RECEIVED PRE-DEPRIVATION PROCESS, AND HAD THE OPPORTUNITY TO PURSUE POST-DEPRIVATION REMEDIES UNDER ILLINOIS LAW FOR ANY PURPORTED RANDOM AND UNAUTHORIZED PROPERTY DEPRIVATIONS.

Easter House has used strong language in its petition – that the Seventh Circuit's decision is an "affront" to the authority of this Court, that the Seventh Circuit "stubbornly" adheres to its prior judgment and "denigrates" this Court's decision in *Zinermon*. Easter House all but accuses the Court of Appeals of bad faith. At the same time, Easter House has used equally strong language against the state defendants, saying they engaged in "conspiracy" and "abuse of power." This hyperbolic rhetoric is simply not borne out by the facts (many of which Easter House did not include in its petition). Consideration of the full record shows that a judgment for defendants is the only correct and just result in this case, and is not a departure from this Court's precedent[4].

The job of a DCFS licensing official is to insure that child welfare agencies act in the best interests of the children they place and that those agencies are run professionally and in accordance with Illinois law and DCFS regulations. In this case, as described above, one of the DCFS regulators, Florence McGuire, received a serious

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[4] Other Circuits deciding cases after *Zinermon* have reached results similar to the Seventh Circuit. See, e.g. *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990); *Katz v. Klehammer*, 902 F.2d 204 (2nd Cir. 1990).

complaint about wrongdoing at Easter Hose-breach of confidentiality, profiteering (trying to place children solely on the basis of the wealth of adoptive parents), and questionable uses of foreign entities possibly to circumvent state regulation. At the same time, Easter House was now without any professional staff to guide it. All the social work staff resigned. Ms. McGuire temporarily delayed the otherwise automatic transmittal of the agency's new license, pending further review of the situation. A few days later Easter House was notified in writing of the status of its license, and that it had a right to a hearing under Illinois law.

In giving this notice and opportunity to be heard at the beginning of the process, before any final action had been taken, Felder "initiated the procedural safeguards set up by state law." *Zinermon*, at 110 S.Ct. 990. The Child Care Act of 1969, Ill. Rev. Stat. (1973), Ch. 23 § 2219, provided that "Prior to revocation or refusal to renew a license, the Department shall notify the licensee by registered mail . . . of the contemplated action and that the licensee may, within 10 days of such notification . . . request in writing a public hearing before the Department . . . and a written statement of charges from the Department."

The notice given to Easter House was perhaps more generous than it needed to be, because Easter House was told only that its license expired, and had to reapply. The license was not revoked permanently. Without adequate staff the agency could not place children for adoption anyway. Subsequent events showed that when Easter House hired adequate professional staff, DCFS released the license (albeit with some misgivings) within a few

weeks time, without ever requiring a formal reapplication.

On February 4, 1975, Easter House declined a formal hearing. The Child Care Act provided that at such a hearing, if it had taken place, "the licensee shall be allowed to present in person or by counsel such statements, testimony and evidence as may be pertinent to the charges or to the defenses thereto." Ill. Rev Stat. (1973), Ch. 23 § 2219(d). If, after this full adversarial hearing, DCFS decided to revoke a license, the agency could pursue administrative review in the Illinois courts. Id. at § 2227. The state Circuit Court would review the agency determination to insure it was not against the manifest weight of the evidence. *Kellogg Corp. v. Dept of Revenue*, 14 Ill. 2d 434, 439, 153 N.E. 2d 45, 48 (1958). The Court could reverse the agency decision or remand. If unsuccessful at the circuit court level, an agency could appeal to the Illinois Appellate Court as of right and from there seek discretionary review in the Illinois Supreme Court.

With respect to the property interest in Easter House's license, then, the following seems clear: Illinois law provided an extensive array of procedures to resolve disputes about licenses; DCFS officials, in conjunction with DCFS lawyers, initiated that system; DCFS officials met informally with Easter House to resolve the staffing problem; Easter House chose *not* to pursue the formal state procedures offered it; and the licensing issue was resolved rapidly.

No coherent theory of procedural due process should permit a federal plaintiff to bypass an extensive array of state predeprivation procedures and seek damages when

those state procedures were more than capable of making him whole. In this case, an adoption agency with its license expired, out of compliance with state regulations, and unable to lawfully complete an adoption without adequate staff, seeks money damages because it was not offered a predeprivation hearing it did not need and refused when offered. This simply is not a proper case under any rational theory of procedural due process.

If a property deprivation is caused by the "random and unauthorized" conduct of a state actor, then a post-deprivation hearing offered by the State provides all the process that is due. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Zinermon v. Burch*, 110 S.Ct. 975 (1990). In *Zinermon*, the Court concluded that the actions of the Florida mental health officials were not "random and unauthorized" for three reasons: (1) the mental patient's liberty deprivation was not unpredictable, i.e., it was foreseeable that errors could occur at a predictable point in the admissions process; (2) predeprivation process was not impossible, or futile; (3) the conduct was not "unauthorized" because the Florida officials were delegated the duty "to initiate the procedural safeguards set up by state law to guard against unlawful confinement." 110 S.Ct. 990.

Here, while it is true the DCFS officials had some degree of state delegated authority to deal with license revocations, these officials meet the test *Zinermon* lays out: with the advice of agency counsel, Felder "initiated the procedural safeguards set up by state law" in the Child Care Act to prevent an erroneous refusal to review Easter House's license. Due process requires a hearing "at

a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Felder offered this, in certified letters, and personal meetings. The Child Care Act's extensive predeprivation and appellate procedures met the requirements of *Zinermon* and, if utilized, would have been sufficient to correct errors occurring at any point in the licensing process. At the most fundamental level – the amount and timing of the process offered by the state officials – this case is vastly different from *Zinermon*. There simply was no obdurate refusal to invoke state procedures.[5]

Due process is a "flexible concept that varies with the particular situation." *Zinermon*, at 110 S.Ct. 984. Determining what process is due in a given case requires an application of the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), weighing the private interest, the Government's interest, and the risk of error from the procedures challenged compared to the probable value, if any, of additional procedures. *Zinermon*, at 110 S.Ct. 984. Here, too, the scales weigh very differently from the situation in *Zinermon*.

A person's confinement in a mental hospital is a significantly greater intrusion than a few weeks delay in

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[5] Felder testified:

Q. On that date on which you had a conversation with him [Kurtz], did you deny him the right to a hearing?

A. Oh, no, that right to a hearing was protected until such time as a hearing was actually scheduled or had occurred. (Tr. 221)

relicensing an adoption agency, particularly where, as here, there was no actual loss of the agency's license. In *Easter House*, the government's interest is greater than in *Zinermon* – it must act to protect adoptive children and prevent breaches of confidentiality which could harm biological and adoptive parents. When the DCFS defendants temporarily delayed the mailing of Easter House's new license, giving notice and opportunity to be heard, they acted appropriately under those circumstances. Requiring as a matter of constitutional law additional predeprivation procedures (which these defendants could never have reasonably anticipated given the state of the law in 1975) would have added nothing of benefit.

The mental health officials in *Zinermon* had to initiate due process for incompetent mental patients who were not able to protect their rights. Their constitutional duty in that setting is much greater than what is presented here. Having been told by the state of the proposed DCFS action, Kurtz (himself an attorney) then had the ability to invoke state procedures if he so chose.

Although in its petition Easter House focuses exclusively on the license, the jury verdict was based on other alleged property deprivations as well: that Smith removed its files, tried to take its business, and used its corporate name. It alleges that the DCFS defendants "conspired" with Smith to do these things. A fair analysis of the evidence shows that all of this conduct was initiated by Smith, without the prior knowledge, over the objection, or against the recommendation of the DCFS officials. It therefore cannot be said that this conduct was done under color of state law or is "fairly attributable to the state." See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937

(1982); *NCAA v. Tarkanian*, 109 S.Ct. 454 (1988). But even without considering that point, the Seventh Circuit decision is consistent with *Zinermon* – these actions, even if attributable to the DCFS defendants, were "random and unauthorized" and fully redressable through abundant postdeprivation remedies under Illinois law.

In *Zinermon*, this Court said:

> In *Hudson*, the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct . . . [I]t would be absurd to suggest that the state hold a hearing to determine whether a guard should engage in such conduct.

110 S.Ct. at 989 (Citations omitted). This restatement and reaffirmation of *Parratt* and *Hudson* should dispose of the rest of Easter House's claims.

Easter House claimed Smith removed its files. She did this before the DCFS defendants knew about it. She was advised by Florence McGuire the files were not hers. Smith told DCFS she was taking the files to protect their confidentiality and to complete work on them, and later returned files to Easter House. The continuing dispute about the files was left for Kurtz and Smith to resolve on their own. Smith used the name Easter House over the objection of DCFS, which concluded it had no authority to prevent her use of this corporation name as long as the Illinois Secretary of State approved it. Finally, she placed a child for adoption before her agency was licensed. When Felder learned of this, he intervened promptly to stop her involvement. These incidents, attributed to the

DCFS defendants at trial as part of the "conspiracy," were asserted as deprivations of property without due process. Obviously it was impossible for the State to anticipate that a *private party* would initiate potentially tortious conduct and provide a predeprivation hearing. It would be truly absurd to suggest that the State should hold a hearing before the fact to determine whether a private party, alone or in "conspiracy" with a state actor, should remove files, or place a child before she is licensed, or use a disputed corporate name. A wide array of postdeprivation remedies exist under Illinois law to address these issues. *Easter House v. Felder,* 910 F.2d 1387, 1405-07 (7th Cir 1990) (en banc). For example, why did not Easter House, if it was so concerned about its corporate name, seek a temporary restraining order against Smith in 1975 in the Illinois courts; or seek an accounting from her; or sue for conversion if its files were truly missing; or seek to recover any monies wrongfully obtained by her? A wide array of common-law remedies could have been pursued. Yet Easter House chose instead to initiate federal litigation which has dragged on for some fourteen years.[6]

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[6] Two other aspects of this case are similarly unaffected by *Zinermon*. Easter House claimed DCFS should not have licensed Smith's new agency. This discretionary decision implicates no property interest of Easter House. If Smith's agency commits business torts against Easter House, it has state law remedies; but the mere fact the state licenses a competitor gives Easter House no standing to claim a constitutional violation. The second point is whether telling Judge Comerford that Easter House's license expired and telling one or two phone

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II. THE STATE LICENSING OFFICIALS 8HOULD BE AFFORDED A QUALIFIED IMMUNITY FROM MONEY DAMAGES BECAUSE THEY VIOLATED NO CLEARLY-ESTABLISHED CONSTITUTIONAL RIGHT OF EASTER HOUSE. THE JURY CHARGE, BY CONTRAST, CONTAINED NUMEROUS ERRORS OF STATE AND FEDERAL LAW, AND NO JUDGMENT BASED ON THE JURY VERDICT SHOULD EVER BE PERMITTED TO STAND.

The DCFS officials prevailed in the Seventh Circuit on the question whether Easter House had stated or proven any violation of procedural due process. The Court of Appeals, therefore, never had to reach the other major arguments we put forward: that the state officials were entitled to a qualified immunity from damages for their actions which occurred in 1975; and that the jury instructions upon which the verdict was based were so massively erroneous that no jury verdict based on them could ever stand. Easter House has asked this Court to summarily reinstate the district court judgment without any consideration by this Court, or by the *en banc* Court of Appeals, of these important points which were fully briefed below. Summary reversal without plenary review of these issues by the Seventh Circuit or this Court would be most unfair and highly inappropriate. Easter House's failure to state an adequate due process claim is perhaps

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callers in early January 1975, that Easter House was "under review" was a property deprivation. These were truthful statements. If defamatory statements implicate no constitutional right, *Paul v. Davis*, 424 U.S. 693 (1976), neither do truthful, nondefamatory statements.

the primary, but by no means the only, reason why any judgment in its favor should never be permitted to stand.

State officials have a qualified immunity from money damages if their conduct does not violate constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Unless "the law clearly proscribed the actions" taken, officials are immune. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). The standard depends on the "objective legal reasonableness" of the challenged actions. *Harlow*, at 457 U.S. 819. The goal of the doctrine is to make it possible for officials "reasonably to anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183 (1984). The doctrine is designed to prevent the social costs of harassing litigation that inhibit officials in the discharge of their duties and to insure that scarce judicial recesses are allocated only to those constitutional claims that are presumptively meritorious based on clearly established law.

To determine whether a constitutional right, in this case procedural due process, is "clearly-established" in a given case, the constitutional right must be phrased not in general terms, but in a more particularized sense:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . *but it is to say that in the light of pre-existing law the unlawfulness must be apparent.*

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (Citations omitted) (Emphasis added).

It was not clear in 1975, nor is it clear today, that Easter House was entitled to a full hearing before the January 6 and 8 letters were mailed; nor, as an antecedent question, whether those letters constituted any property deprivation at all – the license had expired, and no order of immediate closure was imposed by DCFS, (Ill. Rev. Stat. (1973), Ch. 23, §2219). Nor was it clear, then or now under the cases, that giving Easter House the chance to correct the deficiency in its staff informally was a constitutional tort. One would think that quite the opposite was true. Nor could it have been imagined that to license a competitor of Easter House could expose DCFS staff to federal liability, as happened here.

In 1974, only months before these events, this Court stated that a postdeprivation hearing was constitutionally adequate: "The usual view has been 'where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate'." *Mitchell v. W.T. Grant*, 416 U.S. 600, 611 (1974), quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). Procedural due process is a flexible concept that is not susceptible to *per se* rules. When a pre-deprivation hearing is required, what type of hearing it should be – these questions must be answered on a case-by-case basis under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Yet, in this case, the jury was instructed

that Easter House had a *per se* right to a pre-deprivation hearing.[7]

The jury was also instructed on numerous aspects of state law. Although this was a section 1983 case, supposedly seeking to vindicate federal rights, the jury was permitted to predicate liability on purported violations of state law. Deviation from a state procedure manual or rule does not abrogate qualified immunity or equate to a constitutional violation. *Davis v. Scherer,* 468 U.S. 183 (1984).

For example, the jury was told that if Felder was wrong to initiate action against Easter House because the agency was not "consistently" violating standards under the Child Care Act, that could be evidence of a constitutional violation. (Tr. 1405) (Of course, that issue is what the state's formal hearing process was designed to address). The jury was also permitted to predicate federal liability on the Illinois law of corporate names.[8]

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[7] The jury instruction stated:

> "When I say that an individual or corporation is deprived of its property without due process of law, I mean that it is deprived of such property or liberty without the authority of the law or without having been provided with notice and meaningful opportunity to be heard *before* such deprivation." (Tr. 1580) (Emphasis added).

[8] The corporate name instruction carried a particular irony. Illinois law provides that the issuance by the Secretary of State of a corporate name to a corporation does not immunize that corporation from legal challenge by another corporation.

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It was not clearly established in 1975, or currently, that the liability of state officials under the Fourteenth Amendment could be based on purported violations of state law. It was not clearly established then or now that constitutional liability under the Fourteenth Amendment could be based on a private party's use of a corporate name (when the DCFS legal department concluded this was outside the agency's jurisdiction). The DCFS defendants could never have imagined in 1975 that a federal jury would be permitted to "second-guess" their every decision, or attribute Smith's conduct to them as part of a "conspiracy." The jury charge, based on an amalgam of erroneously stated federal and state law, totally misled the jury.

The scope of the trial error in this case goes well beyond the issues discussed by the Court of Appeals. For that reason, we strongly oppose any summary action in this case other than denial of the petition for certiorari.

CONCLUSION

In one respect this case is unique, because it is highly unlikely this particular set of facts – two hostile adoption agencies with the same name simultaneously seeking

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A jury instruction on this point permitted Easter House to argue that this showed DCFS should not have licensed Smith with that name. The more relevant point, which DCFS was not permitted to argue, was that this shows the adequacy of Illinois remedies which Easter House did not utilize. (Tr. 1450-51, 1583)

licensure – will ever recur. In another respect, however, the case is not unique, because in the modern regulatory state large governmental departments process thousands of license applications for all sorts of different businesses and professions. Renewal of these licenses may often be temporarily delayed because of legitimate state concerns. If, every time there is such a delay, a federal due process claim instantly is born (regardless of the procedural framework the state has to minimize, prevent, or correct errors), the consequences to the states, to the federal courts, and to the idea of federalism itself would be severe and regrettable. We respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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